obtained, this was not done by Tay for himself. He as Managing Director made the application and obtained the approval on behalf of the Company. Moreover it shows that Tay had the intention to transfer the subject land to the Company even before the application was made. These facts show that the enhancement of value of the subject land, if any, was not the result of anything done by Tay for the purpose of resale.

Applying the principles enunciated in the above cases we find that Tay's dealing with the subject land was not an adventure in the nature of trade. We agree with the learned Judge of the High Court that the assessment of income tax the subject matter of this appeal should be set aside. This appeal is dismissed with costs here and in the High Court. We order that the deposit be paid to the respondent on account of costs to be taxed.

We take this opportunity to make an observation on the form of the deciding order put up by the Special Commissioners in this case. It consisted of 13 pages. It was lengthy because in addition to the orders made the Special Commissioners included in it a statement of all the facts found by them and also a statement of the contentions of both parties in detail. In our opinion a deciding order should not include such statements. What should be stated in a deciding order is the decision and order to confirm or discharge the assessment or to direct that the assessment be amended and to specify the amendments, or to require the amendments to be determined by agreement between the parties, *vide* paragraph 26 of Schedule 5 to the Act. Paragraph 37 of Schedule 5 gives an indication of the idea of the legislature that a deciding order should be a distinct document setting out only the ultimate decisions and orders and that it should be separate from any other documents stating other matters. Paragraph 37 refers separately to facts found, deciding order and grounds of decision. Having regard to paragraphs 26 and 37 of Schedule 5 we are of the view that the Special Commissioners should put up grounds of decision separately from the deciding order, and the practice of putting up lengthy deciding orders in the way it was done in this case should be discontinued. In the grounds of decision they may state all the facts found by them and the contentions of the parties in detail.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*

GIMSTERN CORPORATION (M) SDN. BHD. & ANOR. v. GLOBAL INSURANCE CO. SDN. BHD.

[S.C. (Salleh Abas L.P., Mohamed Azmi & Wan Hamzah S.C. JJ.) July 24 & October 17, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 26 of 1986]

Contract – Insurance – Agency – Motor Insurance – Cover notes issued – Insurer on risk – Party cannot take advantage of his own wrong – Road Traffic Ordinance, 1958, s. 75.

Practice and Procedure – Issues not pleaded in statement of defence – R.H.C. 1980, O.18 r.8.

Insurance – Outstanding premium – Claim – Defence – Issues not pleaded.

In this case the respondent brought an action against the first appellant, the insurance agent, for outstanding premium and against the second appellant as guarantor. In their defence the defendants contended –

(a) the first appellant had not been supplied with the particulars of the claim;

(b) upon a proper construction of the relevant agreement entered into by the first appellant with the respondent company the claim was without basis;

(c) the alleged guarantee by the second defendant was illegal, inoperative and of no effect.

At the trial before the Sessions Court the defence contended that –

(i) the respondent company could claim premium only in respect of the period when it was on risk, and since in some cases premium was not paid by the insured although cover notes had been issued, the respondent company was not on risk; and further more, some policies had been cancelled by the plaintiff company and in respect of these it was not on risk;

(ii) the first appellant had ceased to operate at 131-A, Jalan Perisai, Taman Sri Tebrau without the consent of the respondent company and therefore under clause 14 of the agency agreement the agency had been thereby terminated.

These issues had not been pleaded.

The President of the Sessions Court upheld the unpleaded contentions of the defence and dismissed the respondent's claim. On appeal the High Court reversed the decision of the President and gave judgment for the appellant. The respondent appealed.

Held: (1) the appellants had failed to establish their case on the issues raised in the statement of defence;

(2) the issues brought up at the trial had not been pleaded in the statement of defence and therefore the contentions should not have been entertained;

(3) even if the unpleaded issues had been properly pleaded in the statement of defence, the appellants could not succeed as (a) the defence had not queried the statement of accounts sent monthly to the first appellant (b) where cover notes were issued but premia were not paid in full, the respondent company was still on risk, and (c) the appellant could not take advantage of his own wrong to put an end to the contract.

Cases referred to:

(1) *Attorney-General* v. *Lord Mayor etc. of City of Sheffield* (1912) 106 L.T. 367.
(2) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31.
(3) *New Zealand Shipping Company Ltd.* v. *S.D.A.E.C.D. France* [1919] A.C. 1.

SUPREME COURT.

Ho Thian Cheh for the appellants.

C.V. Das (*V. Rajindran* with him) for the respondent.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the Judgment of the Court): The respondent in this appeal (to whom we shall refer as the plaintiff Company) was running an insurance business and appointed the first appellant (to whom we shall refer as the first defendant) as an agent in the insurance business under the terms and conditions contained in an agency agreement which they executed on November 13, 1979. In January 1981 the plaintiff company brought an action in the Sessions Court against the first defendant claiming a sum of $18,708.60 being outstanding premium, particulars of which had allegedly been given to the first defendant. The second appellant (to whom we shall refer as the second defendant) was joined as a co-defendant on the premise that he was the guarantor for the first defendant. Both defendants contest the claim and in their Statement of Defence they contend as follows:–

(a) the first defendant had not been supplied with the particulars of the claim;

(b) upon a proper construction of the relevant agreement entered into by the first defendant with the plaintiff company the claim was without basis;

(c) the alleged guarantee by the second defendant is illegal, inoperative and of no effect.

As regards (b) no facts are pleaded, and thus the contention must be taken to relate to the construction of the agreement not in connection with or in the light of certain facts but to relate to the construction of the agreement by itself purely. Suffice for us to say that the defendants have failed to establish their case on the above issues. Anyhow none of the grounds stated in the memorandum of appeal touches on any of the above issues. Neither did counsel for the defendants when arguing before us deal with any of the above issues. The above contentions are the only issues raised in the statement of defence. However, at the trial before the President of the Sessions Court the defence contended that –

(i) the plaintiff company could claim premium only in respect of the period when it was on risk, and since in some cases premium was not paid by the insured although cover notes had been issued, the plaintiff company was not on risk; and further more, some policies had been cancelled by the plaintiff company and in respect of these it was not on risk;

(ii) the first defendant had ceased to operate at 131-A, Jalan Perisai, Taman Sri Tebrau, without the consent of the plaintiff company and therefore under clause 14 of the agency agreement the agency had been thereby terminated.

These issues brought up at the trial had not been pleaded in the Statement of Defence, and this was a contravention of Order 18 Rule 8 of the Rules of the High Court, and therefore the contentions should not have been entertained (*Attorney-General* v. *Lord Mayor etc. of City of Sheffield*[1]). However, on the completion of the trial the President of the Sessions Court upheld the unpleaded contentions of the defence and dismissed the plaintiff company's claim. On appeal the High Court reversed the decision of the President and gave judgment for the plaintiff company. Hence this appeal to the Supreme Court by the defendants.

Even if the unpleaded issues had been properly pleaded in the Statement of Defence we do not see how the defendants can succeed. According to the evidence the plaintiff company sent statements of account to the first defendant monthly. The defence did not produce to the Court any letter addressed to the plaintiff company to query the correctness or accuracy of the statements of account. When giving evidence the Branch Manager of the plaintiff company (P.W.2) explained that in respect of cancelled policies credits were given to the first defendant for the period when the plaintiff company was not on risk, *i.e.* the period after the cancellation, and he pointed out that credits are shown in the statements of account.

On the other hand the defence made no attempt to show that credits were not given or in respect of which particular cancelled policies credits were not given. When giving evidence the Managing Director of the first defendant (D.W.1) stated that the policies shown in the statement of account P2 from June 1980 onwards had been cancelled. Apart from that statement no evidence was produced to show that those policies had been cancelled. The burden of proving this lies on the defence. It is clear that under section 75 of the Road Traffic Ordinance 1958 immediately on the issue of every cover note the plaintiff company was on risk in respect of it. This is so notwithstanding the endorsement of the following statement on the insurance proposal form:—

"No liability undertaken until the proposal has been accepted and premium paid in full".

The stipulation that no liability is undertaken until premium is paid in full is void as being contrary to the provisions of section 76. This is the position in cases where cover notes are issued before full premia are collected. Parties cannot contract out of an Act of Parliament, that is to say they cannot include in their contract terms and conditions which are contrary to the provisions of the Act. If they do so such terms and conditions are void: *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo.*[2]

The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd.* v. *S.D.A.E.C.D. France.*[3] In the present case the first defendant alleges that it had not obtained the consent of the plaintiff company to cease to operate at the address stated in clause 14(ii). Therefore the first defendant being the blameable party cannot be permitted to take advantage of his own wrong in ceasing to operate at that address without the consent of the plaintiff company, to put an end to the agency agreement.

This appeal is dismissed with costs here and in the courts below. The order of the High Court is affirmed. The deposit should be paid to the respondent (the plaintiff company) on account of taxed costs.

Appeal dismissed.

Solicitors: *Ho Thian Cheh & Co.; Matthew Thomas & Co.*

LEE TAI HOO & ANOR. v. LEE SWEE KEAT & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) July 4, 1984]

[Penang — Civil Suit No. 259 of 1973]

Tort — Negligence — Liability admitted — Damages — Assessment of — Principles applied — Mitigating circumstances.

Road Traffic — Negligence — Liability admitted — Damages — Principles in assessing.

Damages — Negligent driving resulting in collision with shop-house — Irreparable damage — Liability admitted — Principles in assessing.

On June 5, 1972, the defendant negligently drove a lorry and caused it to collide into the plaintiffs' shophouses resulting in their becoming irreparably damaged. Liability for the negligence was admitted by the defendants. The basic issue before the court was the quantum of damages. The questions of law that were raised in the present suit were:

(1) What is the relevant date for assessment of damages;

(2) When are events occurring after the date of the tort relevant and when irrelevant in the assessment of damages;

(3) Does the plaintiffs' duty to mitigate in respect of tortious liability extend to the protection of the defendant from the effects of inflation.

Held: (1) damages ought to be assessed at the date of the judgment;

(2) all events are relevant up to the date of assessment of damages in court;

(3) the duty to mitigate does not operate to protect a defendant from the inflationary increases in damages;

(4) judgment for the first plaintiff in the sum of $80,366 with interest at the rate of 6% and for the second plaintiff in the sum of $25,429 with interest at the rate of 6%.

[*Editorial Note:* The defendants appealed to the Federal Court against the judgment of Edgar Joseph Jr. J. (Federal Court Civil Appeal No. 221 of 1984). The Supreme Court (Abdul Hamid C.J. (Malaya), Mohamed Azmi and Syed Agil Barakbah S.C. JJ.) upheld all points of law decided in the court below. However, (a) it varied the award for interest from 6% to 8% in favour of both plaintiffs from the date of judgment to the date of payment, (b) it set aside the award of $5,616.00 for loss of 1,872 sq. ft.